Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-660

PLEASANTON GRAVEL COMPANY,

Petitioner,

v.

COMMISSIONER OF THE INTERAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE PETITIONER IN REPLY

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Palmer v. Bender, 287 U.S. 551 (1933) was decided 45 years ago. The decision set forth an "economic interest" test to be used in oil and gas production leases specifically to determine to whom the depletion allowance would be available.

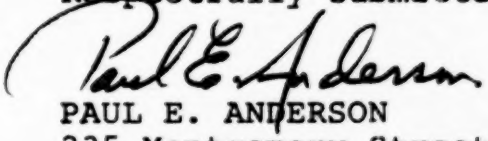
The test was not to determine whether or not there had been a "sale or exchange" within the purview of the capital gains provisions. In the sense that Palmer v. Bender

created a lease out of a sale, it is wrong.

What is an "economic interest" in a sale? Do we use language of a "lease" to make a sale? How do you make a sale where sound business practice indicates that in no way could a reasonably certain price be fixed at the outset?

Upon entering the agreement involved herein, the taxpayer sold ALL mineable quantities of gravel -- from this point on he could no longer transfer this right to anyone else. If this complete divestiture of interest is not a sale, what is?

Respectfully submitted,



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Dated: December 15, 1978.